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CASE NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

1980-81 TERM

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RODRIGUE J. FRANCOIS,

PETITIONER-PLAINTIFF

VS.

MAX CLELAND, as ADMINISTRATOR
OF VETERANS AFFAIRS, VETERANS
ADMINISTRATION, UNITED STATES
OF AMERICA,

RESPONDENT-DEFENDANT

---

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# PETITION OF RODRIGUE J. FRANCOIS FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

1. Can an agency of the federal government, after having imposed more stringent employment practice standards upon itself by promulgating affirmative action guidelines as required by federal statute and administrative regulation, fail or refuse to follow those guidelines and then assert that an employee bringing an employment discrimination action based on age and national origin is not qualified for his position when his alleged lack of qualification is attributable to the agency's failure or refusal to follow its own regulations and the statutes governing its actions?

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ARGUMENT:

An Employee of an Agency of the the Federal Government Asserting a Claim of Employment Discrimination Based on Age and National Origin is Entitled to Relief Under the Age Discrimination in Employment Act and Title VII when He Establishes that His Employer has Failed or Refused to Follow Mandatory Affirmative Action Guidelines which Impose a More Rigorous Standard of Nondiscrimination than is Required of Private Employers and that the Employer's Failure/Refusal Substantially Contributed to the Employee's Failure to Remain Qualified for the Position which He Held.....34

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## REFERENCE TO REPORT OF OPINIONS

The opinion of the United States District Court for the Middle District of Alabama was unreported.

The United States Court of Appeals for the Fifth Circuit affirmed the decision of the trial court without opinion at 638 F.2d 1233 (5th Cir. 1981).

## JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 19, 1981. The petitioner timely filed a petition for rehearing on March 4, 1981 and this petition was denied by the United States Court of Appeals for the Fifth Circuit on March 18, 1981.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. §621 *et seq*:

> §633a. Nondiscrimination on account of age in Federal Government Employment
>
> (a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.
>
> (b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay,

as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of

the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of

this section shall not be subject to, or affected by, any provision of this Act, other than the provisions of section 12(b) of this Act and the provisions of this section.

(g)(1) The Civil Service Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Ammendments of 1978, and the effects of section 12(b) of this Act, as added by the Age Discrimination in Employment Act Amendments of 1978.

(2) The Civil Service Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000a et. seq:

§2000e-16. Nondiscrimination in Federal Government employment

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in Section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid

from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Role of Civil Service Commission; compliance of departments and agencies with rules and regulations. Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

The Civil Service Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of

all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Civil action by party aggrieved. Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717 (a) or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Application of certain provisions. The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Continuing responsibility of agencies and officials to assure nondiscrimination. Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

EXECUTIVE ORDER NO. 11478, 34 FED. REG. 12985, AS AMENDED BY EXECUTIVE ORDER NO. 11590, 36 FED. REG. 7831; EXECUTIVE ORDER NO. 12106, 44 FED. REG. 1053, REPRINTED IN U.S.C.S., NOTE TO 42 U.S.C.S. §2000(e) (SUPP. 1980).

Sec. 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment oppor-

tunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide tne maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

Sec. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimina-

tion in employment because of race, color, religion, sex, national origin, handicap, or age.

Sec. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

Sec. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

Sec. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions.

This Order does not apply to aliens employed outside the limits of the United States.

Sec. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

Sec. 8. This Order shall be applicable to the United States Postal Service and to the Postal Rate Commission established by the Postal Reorganization Act of 1970.

5 C.F.R. §713.202 (1978):

It is the policy of the Government of the United States and of the government of the District of Columbia to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

5 C.F.R. §713.203 (1978):

The head of each agency shall exercise personal leadership in establishing, maintaining, and carrying

out a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Under the terms of its program, an agency shall:

(a) Provide sufficient resources to administer its equal employment opportunity program in a positive and effective manner and assure that the principal and operating officials responsible for carrying out the equal employment opportunity program meet established qualifications requirements;

(b) Conduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions, including disciplinary action against employees who engage in discriminatory practices;

(c) Utilize to the fullest extent the present skills of employees by all means, including the redesigning of jobs where feasible so that tasks not requiring the full utilization of skills of incumbents are concentrated in jobs with lower skill requirements;

(d) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(e) [OMITTED]

(f) [OMITTED]

(g) Review, evaluate, and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training, and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;
(h-1) [OMITTED].

VETERANS ADMINISTRATION MANUAL MP-5, PART 1, CHAPTER 713:

Section A. Policy, Organization, and Affirmative Action

1. SCOPE

The purpose of this section is to establish responsibilities and program requirements for implementing equal employment opportunity throughout the VA. [It] applies to all organizations and employees of the VA whether or not in the competitive service, including employees paid from nonappropriated funds, but excepting noncitizens employed outside the United States.

2. POLICY

It is the policy of the VA to provide equal opportunity in employment for all qualified persons; to prohibit discrimination in employment because of race, color, religion, sex, national origin [or age] to promote a positive, continuing

program designed to achieve full realization of equal employment opportunity; and to provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, national origin, [or age.]

The Federal Women's Program and the [Spanish-Speaking] Program will be considered integral parts of the total VA Equal Employment Opportunity Program. Special attention will be given in overall program planning to the unique problems of women and the Spanish surnamed as they affect [recruitment, training, and promotion.] to ensure that an equal opportunity is accorded these groups.

3. [OMITTED]

4a-4g. [OMITTED]

4h. Supervisors. Supervisors are responsible for:

(1) Analyzing employment patterns and conditions in their organizational units and identifying any problem areas, either real or potential, which act as barriers to equal employment opportunity for all and taking appropriate measures for their elimination.

(2) Evaluating all appointment, assignment, promotion, [upward mobility,] and training practices within their operations to assure that selections are based on merit and fitness [of] the individual re-

gardless of race, color, religion, sex, national origin, [or age].

(3) Aggressively seeking out qualified employees who they believe have potential for development and following through with actions to provide equal opportunity for training, reassignment or other means for improved employee utilization.

(4) Assuring that the lines of communication are open to all employees under their supervision on an equal basis.

(5) Supporting employees under their supervision who are appointed part-time EEO Counselors, adjusting work schedules and workloads as necessary, and otherwise making every reasonable accommodation to insure that counselors are free to carry out their responsibilities as outlined in section B, paragraph 3, this chapter.

i. Employees: Employees at all levels are expected to support the overall Equal Employment Opportunity Program, and, as may be appropriate in the performance of their official duties, to assure that there is equal respect, equal treatment, and equal service for all persons, regardless of race, color, religion, sex, national origin, [or age. They are expected to cooperate with EEO Counselors, Investigators and Complaints Examiners by providing, upon request, information to the extent of their knowledge, in connection with counselings, investigations, and hearings of discrimination complaints.]

5. [OMITTED]

6. AFFIRMATIVE PROGRAM REQUIREMENTS

a. The written agency "National Plan of Action" covers equal employment in its broadest aspects. This plan includes overall agency objectives and actions to be taken at the Central Office level to provide appropriate direction; guidance and assistance for the achievement of reasonable and measurable progress. The National Plan provides the direction and framework for the development of specific "Plans of Action" at each VA installation.

b. Each Director [and Central Office Personnel Service for Central Office components] will develop and implement a written plan of action tailored to meet local needs and conditions. NOTE: National Cemetery Supervising Officers shall be responsible for formulating a "Regional" plan of action covering those cemeteries within their regions. Local plans for individual cemeteries are not required unless specified by the Director, National Cemetery System or the National Cemetery Supervising Officer. Installations will be guided in the preparation of their plans by the current VA National Plan of Action and, subject to special instructions set forth in paragraph 9 below, by the format prescribed in FPM Ltr. No. 713-22. October 4, 1973.] In developing and implementing the plan, attention will be given to any or all of the following considerations which are appropriate and applicable to the local situation.

(1) Examining the current status of employment of minority persons and women at all levels, organization by organization, (both numbers of employees and distribution by occupational category), using available employment statistics not as an end but as a means of identifying factors which may impede equal employment opportunities.

(2) Establishing clearly that the principles of equal opportunity have complete and unequivocal management support. Staff meetings, station newspapers, bulletin boards, and other locally available resources will be used to communicate policy and program information. Such techniques as publicizing the accomplishments and contributions of minority group and women employees in local news media may also be helpful in getting community understanding and acceptances of the Equal Employment Opportunity Program.

(3) Insuring that appropriate attention is given to the unique circumstances, as they affect employment of women and each of the minority groups represented in the work force and in the community.

(4) Reviewing and expanding recruitment efforts to include sources of qualified minority group persons and women.

(5) Participating at the community level with other employers, with schools and universities, and with other public and private groups in cooperative action to advance equal employment opportunities and

to improve community conditions that affect the employability of minority groups and women at all levels.

(6) Making maximum use of the special youth employment programs, the economic opportunity work experience and training programs established under the Economic Opportunity Act, and related programs.

(7) Evaluating and improving the utilization of employees. This will necessitate a periodic survey of employees to identify underutilized and nonutilized skills and abilities. Working conditions, training, resources and work assignments also should be reviewed to assure that equal opportunity exists for the development and advancement of all employees to the levels and kinds of work for which they are best qualified.

(8) Reviewing all organizational units and occupations to identify positions susceptible to job redesign as needed to open new or better opportunities for initial appointment or advancement of minority group members and women.

(9) Utilizing Spanish-speaking and other minority persons in public contact positions in communities where a substantial percentage of the public served are members of such groups.

(10) Providing for evaluation and control of personnel actions on a continuing basis with particular attention to such considerations as: (a) reasons given by supervisors

when rejecting apparently well-qualified persons for employment, promotion, etc., and (b) eligibles certified for consideration but who are continually passed over.

(11) Assuring appropriate participation of minority group members and women in planning, policymaking, and related management and personnel activities. For example, membership on committees of various types should be reviewed to assure proper representation.

(12) Insuring the coverage of equal employment opportunity in [the orientation of new employees and in] formal supervisory and management training courses, and evaluating the timeliness and effectiveness of such training.

[c. Where plans of action involve changes in personnel policies, practices, or working conditions, stations have the responsibility to consult, or negotiate as appropriate, with recognized labor organizations.]

[d.] Stations should take affirmative action to insure that employees are aware that the plan of action is available for review. In addition, since the plan is a public document, it should be made available, upon request, to interested individuals or organizations.

[e. While specific action items related to age are not required to be included in the plans of action, Equal Employment Opportunity Officers must take affirma-

tive action to ensure that all supervisors are made aware of their responsibilities to carry out the VA policy that all agency personnel actions shall be free of discrimination because of age. VA-wide and local personnel practices shall be reviewed periodically to identify and eliminate any practices which might be in conflict with the policy of nondiscrimination because of age.]

7-10. [OMITTED]

## STATEMENT OF THE CASE

The petitioner, a 44 year-old black physician born and educated in Haiti, brought this action alleging that his termination from the ophthalmology residency program at Veterans Administration Hospital in Tuskegee, Alabama, constituted discrimination against him in federal employment based upon his national origin under 42 U.S.C. §2000e-5(f)(3), and 2000e-16(c), and alternatively, based upon his age under 29 U.S.C. §633a(c)[1] In the plead-

1. Record, V. I, p. 19. The evidence in the case es-

ings, pre-trial order, and through his evidence, the petitioner raised the issue that the Defendant had failed to implement federal employment affirmative action programs required by statute and regulation, and that his termination was attributable to such failure.[2]

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tablished that the petitioner was the only physician ever accepted in the ophthalmology residency program who was over 40 years of age, and he was the only Haitian ever admitted to the program. Record, Plaintiff's Exhibit 63, p. 7. In fact, of the 1,332 fulltime employees and 72 part-time employees at the VA Hospital during the time the petitioner was there, he was the only known Haitian. R. V. II, pp. 218-219. The petitioner was also the only person who ever participated in the residency program to be discharged therefrom. Plaintiff's Exhibit 63, pp. 7-8; Record, V. II, p. 224.

2. Record, V.I, p. 3, 19. 42 U.S.C. §2000e-16(b)(1) requires each covered federal agency to submit an equal employment opportunity plan "in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment." (Emphasis added). This "affirmative action" requirement has been enlarged upon in Executive Order No. 11478 and 5 C.F.R. §713.203. These mandatory statutory and regulatory requirements related to the Title VII categories of "race, color, religion, sex, or national origin," and not to age. (Emphasis added). Nor does 29 U.S.C. §633a, prohibiting discrimination in federal employment because of age, contain any mandatory requirement that federal agencies adopt affirmative action programs to

The Defendant's answer basically denied the allegations of the complaint,[3] and in the pre-trial order, the Defendant took the position that "affirmative action plans do not apply to residency programs."[4] However, the Defendant's own regulations regarding Equal Employment Opportunity were shown to make such plans applicable "to all organizations and employees of the V.A. whether or not in the competitive service, including employees paid from nonappropriated funds, but excepting non-citizens employed outside the United States.[5]

insure against discrimination because of age. However, the Veterans Administration's own regulations include age discrimination within its internal "affirmative action" requirements. Veterans Administration Manual, Part I, Chapter 713, Section A, Paragraphs 2, 6b. (Record, Plaintiff's Exhibit 8.)

3. Record, V. I, p. 8.

4. Record, V. I, p. 22.

5. Veterans Administration Manual, MP-5, Part I, Chap-

(Emphasis added).

The case was tried before the district judge without a jury on July 2 and 3, 1979. The facts that special attention was needed by foreign residents because of speech and adjustment problems,[6] and that special attention was needed by the petitioner because of his age[7] were shown to have been well-known to the petitioner's superiors.

The evidence clearly established that the Tuskegee V.A. Hospital's regulatory responsi-

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ter 713, Section A, Paragraph 1 (Record, Plaintiff's Exhibit 8). Since the judgment of the district court did not even allude to the portion of the petitioner's case attacking the failure of the Defendant's affirmative action plan, and since the Fifth Circuit Court of Appeals simply affirmed without opinion, there is no way for the petitioner to know whether (1) the courts considered that the Defendant could ignore the plan requirements altogether, or (2) whether they agreed with the Defendant that the program had no application to physician residency programs. In either event, the petitioner maintains that the courts were in error.

6. Record, Plaintiff's Exhibit 63, pp. 42-44.

7. Record, Plaintiff's Exhibit 62, p. 52.

bility was to provide "the maximum feasible opportunity to employees to enhance their skills. . . so that they may perform at their highest potential and advance in accordance with their abilities," and that it was required to adopt an Equal Employment Opportunity Plan as its "affirmative commitment to assure equal employment opportunity in all of its operations affecting employees. . . ."[8] Likewise, the regulations required "full utilization of present skills of employees" and "establishment of personnel procedures which assure utilization of employee skills."[9] In implementing these regulations, the V.A.'s "national plan of action" required guidelines "[i]nsuring that appropriate attention is given to. . . unique circumstances...."[10]

8. Record, Plaintiff's Exhibit 3, p. 1-7.

9. Record, Plaintiff's Exhibit 4.

10. Veterans Administration Manual, MP-5, Chapter 713,

The Tuskegee V.A. Hospital did adopt its own affirmative action plans, and the plan for 1976 indicated as a "problem" that "[a]ssessment input from persons concerned with EEO indicates a need for training at all levels for supervisors."[11] Both plans for 1976 and 1977 committed the V.A. Hospital to locate underutilized employees and to insure that supervisors were fully informed of equal employment opportunity programs.[12]

The evidence, as the district court has noted, shows that it was known, "in the summer and fall of 1977" that the petitioner's "position as a resident was in jeopardy."[13]

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Section A, Paragraph 6b(3). (Record, Plaintiff's Exhibit 8.)

11. Record, Plaintiff's Exhibit 11.

12. Record, Plaintiff's Exhibits 10, 11, 12.

13. Record, V. I, p. 45.

Interestingly, while the petitioner's precarious position was being experienced, the Hospital Director published a new Equal Employment Opportunity Plan on September 27, 1977, placing upon line management (supervisors) the responsibility of "[a]nalyzing employment pattern and conditions in their organizational units and identifying any problem areas which act as barriers to equal employment opportunity for all, and taking appropriate measures for their elimination."[14] The evidence, however, also very clearly established that the officials comprising the entire chain of command over the petitioner knew very little about the EEO affirmative action plan, and nothing about its implementation.[15]

14. Record, Plaintiff's Exhibit 12.

15. Examples are found several times in the Record,

Instead of showing any concern at all for the petitioner in the summer and fall of 1977, his supervisors became embroiled in a bitter controversy among themselves during that period. The Chief and Assistant Chief of Ophthalmology developed an obvious personality conflict at least as early as June of 1977, and "it was probably subtle before that."[16] The Hospital administration joined the Assistant Chief in the controversy. The Chief was accused of lying to hospital officials, of keeping ophthalmology residents for excessive periods of time at another hospital to serve his own patients, and of not being physically present for sufficient lengths of time at the V.A. Hospital.[17] On the other hand, the

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some of which are in Plaintiff's Exhibits 61, pp. 70-71; 60, pp. 9-10; 62, p. 54; 63, p. 42; 59, pp. 39-40.

16. Record, Plaintiff's Exhibit 60, p. 77.

17. Record, Plaintiff's Exhibit 60, pp. 36-40; Exhibit 59, p. 75; V. II, p. 246.

Chief thought the Assistant Chief was "tremendously inexperienced and immature," and "lacking in surgical skills."[18] He felt that his contacts with hospital officials led him to believe he was not "dealing with honest people,"[19] and testified there was an atmosphere of fear in the program at that time.[20]

The controversy resulted in the termination of the services of the Chief by the Hospital by letter dated September 27, 1977, effective October 14, 1977, when the Assistant Chief was appointed to replace him.[21]

18. Record, Plaintiff's Exhibit 63, p. 9.
19. Record, Plaintiff's Exhibit 63, p. 27.
20. Record, Plaintiff's Exhibit 63, pp. 45-46.
21. Record, Plaintiff's Exhibits 47, 48, 58.

These two persons had exactly opposite views as to whether the petitioner was qualified to continue in the residency program. The incoming supervisor had nothing but criticism for the petitioner's performance, while she was not so critical of other residents.[22] It appeared to the outgoing supervisor that "she was never able to come up with any positive comments about Dr. Francois," and "it was [as] though [she was] looking for something to pin on him."[23] The outgoing supervisor would have rated the petitioner's performance considerably higher in late 1977, and he would not have recommended that the petitioner be terminated from the program.[24] One of

22. Record, Plaintiff's Exhibits 39; 41; 59, p. 76; 63, pp. 45-47.

23. Record, Plaintiff's Exhibit 63, pp. 37-38.

24. Record, Plaintiff's Exhibit 63, pp. 28-35, 36, 39-41.

the adverse reports on the petitioner, prepared by his incoming supervisor, was dated September 29, 1977,[25] and this was rendered before the effective date of the change in supervisors, and therefore should have been actually prepared by the outgoing Chief, whose input at that time was considered "vital" by the hospital's Chief of Staff.[26]

The petitioner's outgoing supervisor continued to observe him until November 29, 1977, because the petitioner was assigned under his supervision each afternoon until that time.[27] Only a few days later, on De-

25. Record, Plaintiff's Exhibit 32.

26. Record, Plaintiff's Exhibit 60, p. 31.

27. Record, V. III, pp. 335-337; Plaintiff's Exhibits 59, p. 65; 63, p. 39.

cember 9, 1977, the new Chief prepared the petitioner's final rating sheet which ultimately resulted in the recommendation to terminate the petitioner from the program.[28] At the same meeting, the residency review board voted to accept Dr. Willard McCloud, Jr., to replace the petitioner in the program.[29]

28. Record, Plaintiff's Exhibit 32. This rating was followed up by a detailed report prepared by the new Chief and presented to the residency review board on December 22, 1977. Record, Plaintiff's Exhibits 39, 40.

29. Record, Plaintiff's Exhibit 40. Dr. McCloud was a black American, educated in the United States, and in his late twenties. Record, V. II, pp. 219-221; III, p. 453. The central V.A. office had been urging the V.A. Hospitals to "take all positive action to reduce the percentage of foreign medical graduates [to] somewhere in the neighborhood of twenty percent," and that directive included Haitian graduates "[r]egardless of other qualifications." Record, V. II, pp. 236-238. The hospital's Chief of Staff denied that directive had any bearing on the petitioner's termination, but admitted that it did have a bearing on the selection of his replacement. Record, V. II, p. 258.

The district court entered judgment on November 8, 1979, against the petitioner.[30] That judgment was supported by a Memorandum Opinion of the same date generally finding that there was good cause for the termination of the Plaintiff from the residency program, but completely ignoring the Plaintiff's claim that he would not have been terminated had the Defendant's affirmative action plan been implemented.[31]

The Plaintiff then filed an alternative motion for a new trial or to amend the judgment under Rule 59, or to amend the findings under Rule 52(b), F.R.C.P.[32] The fourth

30. Record, V. I, p. 52.

31. Record, V. I, pp. 53-59.

32. Record, V. I, pp. 53-59.

ground thereof challenged the court's decision in that it did not consider the failure of the defendant's agents to abide by its "affirmative action" program. This alternative motion was denied without opinion on November 21, 1979.[33]

An appeal was taken to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court without opinion on February 19, 1981. A panel rehearing was denied on March 18, 1981.

## ARGUMENT

**AN EMPLOYEE OF AN AGENCY OF THE FEDERAL GOVERNMENT ASSERTING A CLAIM OF EMPLOYMENT DISCRIMINATION BASED ON AGE AND NATIONAL ORIGIN IS ENTITLED TO RELIEF UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT AND TITLE VII WHEN HE ESTABLISHES THAT HIS EMPLOYER HAS FAILED OR REFUSED TO FOLLOW MANDATORY AFFIRMATIVE ACTION GUIDELINES WHICH IMPOSE A MORE RIGOROUS STANDARD OF NONDISCRIMINATION THAN IS REQUIRED OF PRIVATE EMPLOYERS AND THAT THE EMPLOYER'S FAILURE/REFUSAL SUBSTANTIALLY CONTRIBUTED TO**

33. Record, V. I, p. 53.

THE EMPLOYEE'S FAILURE TO REMAIN QUALIFIED FOR THE POSITION WHICH HE HELD.

The sole issue in this petition for a writ of certiorari is whether a federal agency's promulgation of affirmative action guidelines operates to impose a higher substantive duty on that agency as regards its employees covered by the affirmative action plan. This question represents an important question of federal law which has not been, but should be, settled by this Court, thereby justifying the exercise of this Honorable Court's jurisdiction pursuant to Rule 17.1 of the Rules of the Supreme Court of the United States.

Discrimination in employment against federal employees because of age and national origin is proscribed by, respectively, 29 U.S.C. §633a and 42 U.S.C. §2000e-16. Executive Order No. 11478 issued on August 8, 1969, as amended by Executive Order No. 12106, expresses the government's policy to provide equal opportunity in Federal employment and

"to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency."

Additionally, this executive order explicitly obligated each department and agency head to establish and maintain an affirmative program of equal employment opportunity. By virtue of this executive order, 42 U.S.C. §2000e-16(b), and regulations issued initially by the Civil Service Commission, each department head had the responsibility to, inter alia, provide sufficient resources to administer the program in a positive and effective manner; utilize to the fullest extent possible, the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so that their potential might be maximized; and to train and advise managers and supervisors to assure their understanding and implementation of this policy.

The Veterans Administration did promulgate such a plan and its provisions were applicable to the Veterans Administration facility in Tuskegee, Alabama at all times pertinent to this action.[34] These provisions operated to impose an affirmative duty on Veterans Administration officials in each of the following areas:

> (1) Examining the current status of employment of minority persons and women at all levels, organization by organization, (both numbers of employees and distribution by occupational category), using available employment statistics not as an end but as a means of identifying factors which may impede equal employment opportunities.
>
> * * *
>
> (3) Insuring that appropriate attention is given to the unique circumstances, as they affect employment of women and each of the minority groups represented in the work force and in the community.

34. Significantly, the Veterans Administration affirmative action plan prohibited discrimination based on age as well as other Title VII factors.

* * *

(7) Evaluating and improving the utilization of employees. This will necessitate a periodic survey of employees to identify underutilized and nonutilized skills and abilities. Working conditions, training, resources and work assignments also should be reviewed to assure that equal opportunity exists for the development and advancement of all employees to the levels and kinds of work for which they are best qualified.

* * *

(10) Providing for evaluation and control of personnel actions on a continuing basis with particular attention to such considerations as (a) reasons given by supervisors when rejecting apparently well-qualified persons for employment, promotion, etc., and (b) eligibles certified for consideration but who are continually passed over.

Plaintiff's Exhibit 8, MP-5, Part 1, Chapter 713.

The Veterans Administration affirmative action plan was formulated pursuant to federal regulations originally promulgated by the Civil Service Commission at 5 C.F.R., Part 713 in accordance with the statutory directive

found in Section 717(b) and (c) of the Civil Rights Act of 1964, as amended, codified at 42 U.S.C. §2000e-16(b) and (c). See 43 Fed. Reg. 60901.[35]

Despite the failure of either the district court or the Fifth Circuit Court of Appeals to address the effect of these regulations, the petitioner has consistently maintained that these regulations are "substantive" as opposed to "interpretive" and therefore, the petitioner is entitled to avail himself of the benefits therein provided.

In determining whether regulations promulgated by federal agencies have the force and effect of law, this Court has observed that where Congress has expressly delegated the authority to an executive agency or department to prescribe regulations for imple-

35. These federal regulations have been transferred from 5 C.F.R., Part 713 to 29 C.F.R., Part 1613. This transfer was effectuated by the Equal Employment Opportunity Commission when it became responsible for the enforcement of equal opportunity in federal employment on January 1, 1979. 43 Fed. Reg. 60901.

menting a statute, the regulations are entitled to "legislative effect." Batterton v. Francis, 432 U.S. 416, 425, 53 L.Ed 2d 448, 456, 97 S.Ct. 2399 (1977).

There can be no doubt that where regulations affect an individual's rights and obligations, and where the regulations fall within the grant of authority provided by the applicable statute, the regulations themselves have the force and effect of law. Chrysler Corp. v. Brown, 441 U.S. 281, 60 L.Ed 2d 208, 99 S. Ct. 1705 (1979).

In this case, Congress specifically vested the Civil Service Commission with the statutory duty to "issue such rules, regulations, orders and instructions as it deems necessary to carry out its responsibilities under [42 U.S.C. §2000e-16]." Regulations were issued pursuant to this statutory directive and at all times pertinent to this action, these regulations were codified at 5 C.F.R. §713.201, et. seq.

Congress also provided that each federal department, agency or unit "shall comply with such rules, regulations, orders and instructions" and that each agency plan was to make "provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential." 42 U.S.C. §2000e-16(b).

Significantly, Congress expressly recognized that each government agency and official was to remain cognizant of "its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478. . . ." 42 U.S.C. §2000e-16(e).

In response to these statutory directives, both the Civil Service Commission and the Veterans Administration promulgated regulations designed to fulfill their respective obligations as regards the affirmative action requirements envisioned and imposed by Con-

gress. The record in this case, however, reflects that the affirmative action program at the Veterans Administration Hospital in Tuskegee, Alabama was in form only and there was no substantive effort to make its benefits available to the petitioner, Dr. Francois, or, for aught appearing, to anyone.

Notwithstanding the agency's affirmative obligation to "[r]eview, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity," and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program, 5 C.F.R. §713.203-(g) (1978), the petitioner's immediate supervisor testified that she had no specific recollection of reading or seeing anything about an affirmative action program for either the Tuskegee Station or Veterans Administration as

a whole.[36]

Even though the defendant's employees had the responsibility to "[p]rovide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs, and other training measures so that they may perform at their highest potential and advance in accordance with their abilities," 5 C.F.R. §713.203(d) (1978), it appears that although the petitioner was developing a natural skill in the operating room and he had "good hands,"[37] the surgical schedule was intentionally altered to deprive the petitioner of his regular slot in the rotation.[38]

The defendant's employees recognized that older, foreign-born residents in the ophthal-

36. Plaintiff's Exhibit 59, pp. 39-40.

37. Plaintiff's Exhibit 65, pp. 14, 44.

38. Plaintiff's Exhibit 65, p. 42.

mology program required special attention. The chief of surgery testified that he felt the petitioner needed special attention because of his age[39] and the former chief of the ophthalmology staff testified that foreign-born residents needed attention to their special problems of speech and adjustment in order to effectively utilize their skills.[40] Even though the defendant's own affirmative action program required that "appropriate attention [be] given to the unique circumstances, as they affect employment of women and each of the minority groups represented in the work force and in the community," VA Manual, MP-5, Part I, Chapter 713, there is no evidence that any of the VA officials at Tuskegee gave the petitioner the attention required by their own regulation.

39. Plaintiff's Exhibit 62, p. 50.

40. Plaintiff's Exhibit 63, pp. 42-44.

The failure of the trial court and the Fifth Circuit to address the defendant's obligations and responsibilities pursuant to its own affirmative action guidelines sanctions the defendant's willful noncompliance with these laudable responsibilities and objectives.

In Jones v. Cleland, 466 F.Supp. 34 (N.D. Ala. 1978), aff'd., 619 F.2d 82 (5th Cir. 1980), the court recognized that the promulgation and implementation of affirmative action guidelines is not an empty gesture, but rather an integral component of effective personnel policies designed to remedy the effect of past discrimination. This holding is consistent with the decisions of this Honorable Court in Batterson, supra, and Chrysler Corp., supra.

The affirmative action guidelines which were considered in Jones v. Cleland, supra, were promulgated by the same defendant who is charged with discrimination against the petitioner in this case, and these guidelines were admitted into evidence in this case. More-

over, in this case as in the Jones case, the plaintiff's prima facie case consisted in part, of evidence that "had the affirmative action plan been fully implemented, as required by law, the plaintiff would not have been [terminated]." 466 F.Supp. at 38. (Emphasis added). Accord, Predmore v. Allen, 407 F.Supp. 1067 (D. Md. 1976).

The Veterans Administration affirmative action program was not optional, nor was it to be implemented on a non-uniform selective basis. Rather this program stated certain policy goals and unequivocally imposed affirmative duties which were designed to achieve those goals in a uniform, across-the-board fashion.

Assuming arguendo that the petitioner's termination from the residency program would have been justified absent considerations of the pertinent affirmative action policies, that fact does not excuse the defendant's failure to follow its own rules. Where an agency has imposed on itself, more rigorous

substantive and procedural standards than ordinarily required, the agency must then proceed in accordance with those more stringent standards. Service v. Dulles, 354 U.S. 363, 388, 1 L.Ed 2d 1403, 1418, 77 S.Ct. 1152, (1957).[41]

From the inception, an essential thrust of the petitioner's claim has been that the defendant failed or refused to apply its affirmative action policy in the intended manner. It is clear from Jones v. Cleland, supra, that the operative effect of a government agency's promulgation of such a program is to provide substantive rights above and beyond rights provided by Title VII and the Age Discrimination in Employment Act. It necessarily follows that the defendant has not tailored its defense to the petitioner's charge of discrimination by showing how he

41. This principle is echoed in Jones v. Cleland, as the court specifically noted that "[d]ue process of law requires an agency of the government to follow its own rules and regulations." 466 F.Supp. at 38.

would have fared had he received the benefits to which he was entitled. It is settled that the defense to charges of discrimination should be responsive to the charges. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 360 n. 46, 52 L.Ed 2d 396, 431 n. 46, 97 S.Ct. 1843 (1977).

As the court noted in Jones, supra:

> "[i]t would be unjust to allow the hospital to rebut the plaintiff's prima facie case by showing that the reason [the plaintiff] was not [retained] stemmed from the hospital's own failure to implement its affirmative action plan."

466 F.Supp. at 38.

The proferred defense to the charge of discrimination is essentially that Dr. Francois was not qualified for the position (ophthalmology resident) from which he was discharged. However, the evidence in the record is abundantly clear that the officials at the Tuskegee VA Hospital made little, if any, effort to understand, implement, or follow their

affirmative action policy, which by its express terms, obligated them to, inter alia, seek out qualified employees and follow through with actions to provide equal opportunity for training, reassignment or other means for improved employee utilization, insuring that appropriate attention was given to unique circumstances, evaluating and improving the utilization of employees and identifying underutilized and non-utilized skills and abilities.

The defendant has asserted, and the trial court has approved, albeit sub silentio, that the plaintiff was justifiably terminated because he was not qualified, even though the defendant did not fulfill its responsibility to take positive and affirmative steps to maximize the plaintiff's opportunity to become (or remain) "qualified." Such a result would be deplorable if the defendant's affirmative action program was optional, or merely desirable, but where, as here, the affirmative action plan is a mandated requirement, the re-

sult is unconscionable. See, Wright v. National Archives & Records Service, 609 F.2d 702, 718-27 (4th Cir. 1979) (Butzner, Winter, JJ., dissenting).

Moreover, the record reflects that not only was the petitioner denied the benefits of his employer's affirmative action plan, but he was also involved, through no fault of his own, in an administrative controversy among his superiors which generated distrust, ill-will and hard feelings. The effect of this controversy on the petitioner cannot be understated; out of all the residents in the ophthalmology program, the petitioner was assigned, as part of his duties, to work at another hospital each afternoon during the fall of 1977. Plaintiff's Exhibit 59, p. 65; Plaintiff's Exhibit 63, p. 39; R. V. III, pp. 335-37. While assigned to the other hospital, the plaintiff was supervised by Dr. Settler, the former chief of the ophthalmology staff at Tuskegee VA Hospital. Dr. Settler's ouster from the chief of staff position and his re-

placement by Dr. Marian Allman can be fairly characterized as acrimonious. Plaintiff's Exhibit 63, pp. 42-79.[42]

The record in this case unmistakably reflects that instead of a calm atmosphere compatible with the fulfillment of the petitioner's educational responsibilities and the care and attention required by the defendant's affirmative action program at this critical time, the plaintiff was unwittingly and unwillingly embroiled in a bitter dispute among his superiors over which he had absolutely no control.

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42. If Dr. Settler had rated the petitioner during the fall of 1977 (Dr. Settler was terminated from the Chief of Staff position effective October 14, 1977), his ratings would have been considerably higher than the ratings given the petitioner by Dr. Allman. Plaintiff's Exhibit 63, pp. 28-35, 39-41.

Moreover, Dr. Settler, with seven years experience in rating ophthalmology residents, would not have recommended that the petitioner be terminated from the program, id., whereas Dr. Allman's recommendations concerning the petitioner were the first ratings she had ever given. Plaintiff's Exhibit 59, p. 14.

It must be emphasized that the petitioner herein does not contend that he was entitled to preferential treatment because he was an older Haitian. This contention has been rejected by both this Court, Texas Department of Community Affairs v. Burdine, _____U.S. _____, _____, 67 L.Ed 2d 207, 219, 101 S.Ct. _____, _____ (1981), and lower courts which have considered the issue in the context of Title VII, Ayon v. Sampson, 547 F.2d 446 (9th Cir. 1976), and the A.D.E.A., Cova v. Coca-Cola Bottling Co. of St. Louis, 574 F.2d 958 (8th Cir. 1978).

Rather, it is the petitioner's position that the defendant should not be allowed to assert that the petitioner was not "qualified" for his position when his failure to remain qualified was directly attributable to the defendant's failure to comply with certain regulations that had the force and effect of law. The obligations imposed by Executive Order No. 11478: to administer the defendant's affirmative action program in a positive and effec-

tive manner; to utilize to the fullest extent the present skills of each employee; to provide the maximum feasible opportunity to employees to enhance their skills; and to provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in the order, have the force and effect of law. United States v. New Orleans Public Service, Inc., 553 F.2d 459, 465 (5th Cir. 1977), vacated and remanded on other grds., 436 U.S. 942, 56 L.Ed 2d 783, 98 S.Ct. 2841 (1978), on remand, 480 F.Supp. 705 (E.D. La. 1979).

Likewise, the regulations originally promulgated by the Civil Service Commission under the circumstances here presented have the force and effect of law. Maryland Cas. Co. v. United States, 251 U.S. 342, 64 L.Ed 297, 40 S.Ct. 155 (1920). Thus, the defendant's officials had the absolute unqualified duty to, inter alia: utilize to the fullest extent possible, the present skills of employees; provide the maximum feasible opportunity to

employees to enhance their skills so that they may perform at their highest potential and advance in accordance with their abilities; and review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity. 5 C.F.R. §713.203 (1978).

In addition to the foregoing, the defendant promulgated his own rules and regulations, and therefore, those rules and regulations were binding even though they operated to impose a more rigorous substantive and procedural standard of conduct on the defendant and his officials. Service v. Dulles, 354 U.S. 363, 1 L.Ed 2d 1403, 77 S.Ct. 1152 (1957); Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed 681, 74 S.Ct. 499 (1954). Thus, the defendant was required to prohibit discrimination based on race, color, religion, sex, national origin or age;[43] aggressively seek

43. The Veterans Administration voluntarily included

out qualified employees who are believed to have the potential for development and following through with actions to provide equal opportunity for training, reassignment or other means for improved employee utilization; insure that appropriate attention is given to the unique circumstances, as they affect the employment of women and each of the minority groups represented in the work force and the community; evaluate and improve the utilization of employees, including periodic surveys to identify underutilized and nonutilized skills and abilities and provide for evaluation and control of personnel actions on a continuing basis. Veterans Administration Manual MP-5, Part I, Chapter 713.

Whether the actions of the defendant's employees in the instant case are characterized as deliberate indifference, benign neglect, or mere nonchalance, it is obvious from the record that the benefits of the affirma-

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age in addition to the other Title VII factors in its affirmative action plan.

tive action program were not made available to the petitioner during his tenure as an ophthalmology resident at Tuskegee VA Hospital. It is the petitioner's position that had the VA officials fulfilled their obligations, as required by law, he would have completed his residency program in a satisfactory manner. The defendant not only ignored his obligations to the plaintiff, but the record also shows that the personnel controversy among his superiors actually disserved his efforts to remain qualified as a second year resident.

The executive order, federal regulations and agency rules made the basis of this petition are not merely procedural safeguards. Morton v. Ruiz, 415 U.S. 199, 39 L.Ed 2d 270, 94 S.Ct. 1055 (1974). It is abundantly clear that these mandates do not implicate interests beyond the legitimate involvement and authority of, respectively, the President, the Civil Service Commission (now the Equal Employment Opportunity Commission) or the Veterans Admin-

istration. Hampton v. Mow Sun Wong, 426 U.S. 88, 48 L.Ed 2d 495, 98 S.Ct. 1895 (1976).

Over sixty years ago, this Honorable Court, in Maryland Cas. Co. v. United States, supra, observed that:

> "[i]t is settled by many recent decisions of this court that a regulation by department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision."

251 U.S. at 349, 64 L.Ed at 302.

This order and the accompanying regulations are consistent with the express statutory mandate, and actually necessary for the accomplishment of the statutory ends. The regulations promulgated pursuant to the statutory scheme set out in 42 U.S.C. §2000e-16(b) fall squarely within the Maryland Casualty holding, yet the defendant in this case has utterly failed to respond to the affirmative

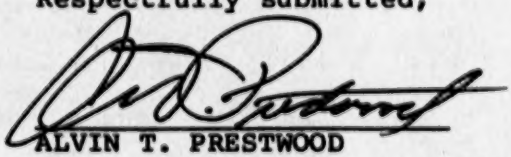
obligations imposed thereunder. The defendant's affirmative action guidelines in this case were bereft of substance and existed only as a pro forma symbol of nominal recognition of the societal goals represented thereby.

It is respectfully submitted that the objectives of both Congress and the Executive Branch are disserved by the casual disregard for guidelines and regulations having the force and effect of law.

## CONCLUSION

Based upon the foregoing, the petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in order to review and resolve the question presented.

Respectfully submitted,



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ATTORNEY OF RECORD FOR
PETITIONER

* * * * * * * * * * * * * *

OF COUNSEL:

CLAUDE P. ROSSER, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition of Rodrigue J. Francois for Writ of Certiorari upon Honorable Wade McCree, Solicitor General of the United States, Honorable Barry Teague, United States Attorney, and Honorable Ken Vines, Assistant United States Attorney, Attorneys for the Respondent-Defendant, by placing said copies in the United States Mail, postage prepaid, being properly addressed to their respective business addresses as follows:

Honorable Wade McCree
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Honorable Barry Teague
United States Attorney
Post Office Box 197
Montgomery, Alabama 36101

Honorable Ken Vines
Assistant Attorney General
Post Office Box 197
Montgomery, Alabama 36101

On this the 16 day of JUNE, 1981.

OF COUNSEL

CASE NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

1980-81 TERM

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RODRIGUE J. FRANCOIS,

PETITIONER-PLAINTIFF

VS.

MAX CLELAND, as ADMINISTRATOR OF VETERANS AFFAIRS, VETERANS ADMINISTRATION, UNITED STATES OF AMERICA,

RESPONDENT-DEFENDANT

---

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUBMITTED BY:

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ATTORNEY OF RECORD FOR PETITIONER

* * * * * * * * * * * * * * * * *

OF COUNSEL:
CLAUDE P. ROSSER, JR.

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IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

| | | |
|---|---|---|
| RODRIGUE J. FRANCOIS, | ) | F I L E D |
| | ) | Nov 8 9:15 AM 1979 |
| Plaintiff, | ) | JANE P. GORDON, CLERK |
| | ) | U.S. DISTRICT COURT |
| VS. | ) | MIDDLE DISTRICT OF ALA. |
| | ) | DEPUTY CLERK |
| MAX CLELAND, Etc., | ) | |
| | ) | CIVIL ACTION NO. 78- |
| Defendant. | ) | 151-E |

JUDGMENT

In accordance with the Memorandum Opinion entered in the above-styled cause on this date, it is

ORDERED, ADJUDGED and DECREED by this Court that the Plaintiff take nothing by his complaint herein; that the above-styled cause be, and the same is hereby, dismissed; and that the costs of this action be, and the same are hereby, taxed against the Plaintiff, for which execution may issue.

DONE this 8th day of November, 1979.

/s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

| | |
|---|---|
| RODRIGUE J. FRANCOIS, | F I L E D |
| | Nov 8 9:15 AM 1979 |
| Plaintiff, | JANE P. GORDON, CLERK |
| | U.S. DISTRICT COURT |
| VS. | MIDDLE DISTRICT OF ALA. |
| | DEPUTY CLERK |
| MAX CLELAND, Etc., | |
| | CIVIL ACTION NO. 78- |
| Defendant. | 151-E |

MEMORANDUM OPINION

This cause is presented to the Court for final judgment on the pleadings, depositions, records and evidence taken in open Court. This Court has jurisdiction under 29 U.S.C. §633a and 42 U.S.C. §§2000e5(f)(3) and 2000e-16(c).

The Plaintiff is a native of Haiti and was educated in the schools thereof and gradu-

ated from medical school in Haiti in 1961. He spent two years in a residency program in ophthalmology in the Veterans Administration Hospital in Tuskegee, Alabama, and this residency was terminated in early 1978 for reasons which, the Plaintiff contends, were based on his age and national origin. The authorities at the VA Hospital deny that Plaintiff was terminated because of his age or national origin, though they admit that, insofar as they know, no resident over 40 years of age and no Haitian native resident has ever completed the residency course at the VA Hospital in Tuskegee; however, no other such resident has ever applied for and begun the residency program at the VA Hospital in Tuskegee. The Plaintiff seeks a mandatory injunction requiring his re-employment, restitution of back pay, costs and attorney's fees.

The resident program for medical residents at the VA Hospital in Tuskegee involves appointment to service for a three-year term "unless sooner terminated". The appointments

are subject to periodic review by the Resident Review Board composed of the Chief of Staff, his assistant, various department heads, the chief of the department utilizing the resident's speciality, and the Chairman of the Medical Advisory Committee. All decisions or matters concerning a resident's appointment, promotion or termination are considered by the Resident Review Board. The Board makes recommendations to the Hospital Director and to the Medical Advisory Committee, which then makes the ultimate decisions regarding each resident.

Each resident's performance is evaluated at six-month intervals on a form showing spaces for grades of "very satisfactory", "satisfactory", "fairly satisfactory", or "unsatisfactory" in 13 broad areas. This sheet and the grades assigned each resident accompany his progress throughout his entire three years, and the resident is expected to exhibit greater knowledge and skills at each level of training. The regulations governing the VA

Hospital do not specify the person who shall make the initial evaluation, but the chief of the department in which the resident is assigned ordinarily rates the resident. The nominal Chief of the Ophthalmology Department was Dr. Settler[1] until the fall of 1977, but Dr. Settler was at odds with the VA Hospital. Dr. Allman acted as the chief of that department from early 1977 until she was appointed chief on October 10, 1977.

If a resident is given an "unsatisfactory" rating in any area, the Board reconvenes

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1/ In the spring and summer of 1977, Dr. Settler was nominally the Chief of Ophthalmology for the VA Hospital in Tuskegee, although he had, by that time, taken a position on the staff of John Andrew Hospital at Tuskegee Institute, Alabama, and he devoted little, if any, of his time to the duties as the Chief of Ophthalmology at the VA Hospital. It is conceded that, although Dr. Settler was chief of that branch in name, Dr. Allman was carrying on the functions of Chief of Ophthalmology at the VA Hospital, and Dr. Settler had very little to do with it. It is, however, not contended that Dr. Settler did not have the right to take the Plaintiff to John Andrew Hospital for duties not inconsistent with his duties to the resident program at the VA Hospital.

in a special meeting after a three-month interval to determine if the resident has improved sufficiently to continue in the program. If the grades in any of the 13 broad areas are unsatisfactory for two or more six-month intervals, the Board recommends to the Hospital Director and to the Medical Advisory Committee that the resident be terminated or that he be allowed to repeat the then-current year of residence. Any unsatisfactory rating is reviewed by the Resident Review Board every three months.

The Plaintiff complains primarily that Dr. Allman was prejudiced against him because of his age and because of his national origin and that she, therefore, graded him as to such poor performance as to cause the Resident Review Board, as well as the Hospital Director and the Medical Advisory Committee, to act in effecting the Plaintiff's termination.

The Defendant denies any discrimination against the Plaintiff and alleges that the Plaintiff was terminated or that he abandoned

his residential program because of his poor performance and the fact that all concerned knew that he would be terminated or be required to repeat the second year of his residency if he remained at the VA Hospital in Tuskegee.

The burden of proof in discrimination-in-employment cases is controlled by the same rules, whether the discrimination is allegedly based on age, national origin, or for any other prohibited reason. Cova v. Coca-Cola Bottling Co. of St. Louis, 574 F.2d 958, 959:

> "By way of introduction, we note that the guidelines set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), though specifically addressed to actions under Title 7 of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., can be generally applied in age discrimination cases. See, Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975). Thus, a plaintiff may establish a prima facie case that his or her discharge violated the age discrimination in employment act by showing (1) that he or she is within a protected age group, (2) that he or she met applicable job qualifications, (3)that, despite these quali-

> fications, he or she was discharged, and (4) that, after the discharge, the position remained open and the employer continued to seek applications for persons with similar qualifications. Once such a prima facie case has been made out, the burden shifts to the employer to rebut plaintiff's showing. An employer may meet this burden by showing that the discharge was 'for good cause,' 29 U.S.C. §623(f)(1). If the employer meets his burden, the burden of persuasion reverts to the plaintiff. The ultimate burden that plaintiff must meet is to show that age was a determining factor in the discharge (citations omitted). The act does not require that advanced age and substantial length of service entitle employees to special favorable considerations; it requires merely that an employee within the protected age group not be the subject of discrimination because of his or her age."

The Plaintiff contends that Dr. Allman's prejudice against him was demonstrated by the fact that Dr. Allman made formal charges against the Plaintiff, and formal evaluation procedures figures prominently in determining the discharge of the Plaintiff. While formal charges are not always necessary, Cova v. Coca-Cola Bottling Co. of St. Louis, supra, at

961, the litigant who properly prepares his case for presentation is far more likely to succeed in court or administrative proceedings. See, Mastie v. Great Lakes Steel Co., 424 F. Supp. 1299 (E.D. Mich. 1976); Gill v. Union Carbide Corp., 368 F.Supp. 364 (E.D. Tenn. 1973); Stringfellow v. Monsanto Co., 320 F.Supp. 1175 (W.D. Ark. 1970). Dr. Allman, having been the target of complaints made by the Plaintiff to acquaintances, as well as to Congressmen, was well advised to document her records and make formal charges against the Plaintiff which he could consider and answer in due course.

Dr. Allman might well have rested her case against the Plaintiff on the Plaintiff's apparent lack of responsibility as manifested by the fact that he seemed to feel no responsibility to report to his assignments on schedule. It was virtually conceded that the Plaintiff was late for his appointments at the residency program as much as 50 percent of the time and that he was often absent completely.

The Plaintiff explained his habitual tardiness by saying that, as to his duties in the afternoon at the VA Hospital, he was assigned by Dr. Settler to duties at John Andrew Hospital, which conflicted with his residence program at the VA Hospital and which kept him involved most afternoons so that he would necessarily be late in reporting to his resident program at the VA Hospital. As to the morning tardiness, the Plaintiff complained that Dr. Allman assigned him so much extra work, supposedly to maintain his efficiency in the program--sometimes reading of four or five books a night--that he often overslept and was unable to be prompt in coming to the VA Hospital for his morning duties as a resident. On one occasion during his residency, the Plaintiff drove his automobile to the northeastern part of the United States and was about a week late returning for resident duty because he said he had automobile trouble. On December 23, 1977, at the time Plaintiff was notified that the Board would recommend that he repeat the

second year of residency or be discharged or be allowed to resign, the Plaintiff left the premises of his duties without conferring with anyone. Hospital authorities next heard from the Plaintiff on January 13, 1978.

It may be somewhat significant that, when the Plaintiff returned one week late from upper New York, Dr. Settler had been replaced by Dr. Allman as the acting Chief of Ophthalmology and that, when she first contacted the Plaintiff as Chief of the Ophthalmology Department, the Plaintiff was about a week late in reporting for his duties. The Plaintiff reported that he had car trouble in Buffalo, New York; that he sent a wire to Dr. Settler notifying him of the delay; and upon arrival at Tuskegee, he ran some errands, then went to the clinic. At that time, Dr. Allman, as acting chief, emphasized promptness, and the Plaintiff said that Dr. Allman then asked if all of his people were that unreliable. The Plaintiff reported that Dr. Allman said that

she had known a Dr. Bourjolly[2], a Haitian she had known in St. Louis in her resident program who was very nonchalant, and that she knew other Haitians who were not dependable. The Plaintiff also complained that Dr. Allman assigned better surgical jobs to other residents, including a Dr. Sing who was the Plaintiff's junior in the program. The Plaintiff further criticized Dr. Allman's skill as a surgeon.[3]

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2/ Dr. Bourjolly testified he was a native of Haiti; that he, his wife, and Dr. Allman were good friends and saw each other socially; that Dr. Allman appeared to have no resentment of Haitians; that he had known the Plaintiff, who had told him that he had had trouble with Dr. Allman but never mentioned that Dr. Allman had said anything derogatory about any Haitian; that he never heard Dr. Allman make derogatory statements about Haitians or any foreigner whatsoever, though he had heard Dr. Allman say that she and the Plaintiff could not get along as the Plaintiff was not working as he should as a resident.

3/ While Dr. Allman's skill as a surgeon or as an ophthalmologist is not here in issue, the evidence is undenied that she is a board-certified ophthalmologist.

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The evidence also showed that, toward the end of the summer of 1977, the Plaintiff attempted to arrange to go to Miami for a rotational residence the following spring through contacts with the Chief of Ophthalmology in Miami, but the Plaintiff did not consult either Dr. Settler or Dr. Allman or any other authority of the VA Hospital because "he felt this was his own business, furthering his own education, and none of the Veterans Administration's business."

It appears to this Court that the Plaintiff is not aware of the fact that the work of a resident in a hospital is most important; that many people--doctors, nurses, and patients--are inconvenienced by a break in schedule; and that medical services may be denied some patients because of irresponsibility of residents who, if prompt and considerate, would be furnishing adequate medical service to their patients and medical aid to the doctors and nurses.

Dr. Allman's next complaint about the Plaintiff reflects directly upon the Plaintiff's honesty. The first instance involved the Plaintiff's requesting a Mrs. Wright to mark him present for a program at the eye clinic to which Dr. Allman said the Plaintiff was absent, and the Plaintiff said that he was tardy. The Plaintiff admitted that he was not at the eye clinic when he should have been at the first of the program and that he did ask Mrs. Wright, a secretary of the group, to give him credit when he had been marked absent. The evidence is inconclusive as to exactly when the Plaintiff did show up for the eye clinic, if at all, Dr. Allman contending that she did not see him there at all. The next instance of alleged dishonesty arises from statements made by the Plaintiff in letters to Dr. Chase, the Medical Director of the Department of Medicine and Surgery of the VA Hospital, and to Senator Cranston. In these letters, the Plaintiff stated that his first two years at the resident program in the VA Hos-

pital were highly rewarding, though he admitted from the stand that in his third six-month rating he got two unsatisfactory reports on Dr. Settler's rating and that his first two years were not highly rewarding to him. The Plaintiff also stated that, after Dr. Allman became acting Chief of Ophthalmology at the VA Hospital in Tuskegee, she gave him all unsatisfactory grades, but actually the record shows, and the Plaintiff admitted at the trial, that Dr. Allman actually gave the Plaintiff several satisfactory grades. The Plaintiff also claimed in the letter that Dr. Allman herself had had a six-month probationary sentence and had been rated unsatisfactory by Dr. Settler, her predecessor. The Plaintiff was also unable to substantiate this claim made in the letter. This Court is of the opinion that these inconsistencies in the Plaintiff's statements cast a dark shadow on the character of the Plaintiff and cause this Court to doubt that he is worthy of belief.

In response to Dr. Allman's complaint, that the Plaintiff was in the habit of plagiarizing other residents' reports in his reports or "work-ups" made as to those patients he treated, the Plaintiff contended that he did not copy the exact language of other residents, he simply made a similar diagnosis and used other residents' language to express it. Dr. Allman reported that the Plaintiff did not do sufficient work-ups on the patients whom he treated. The Plaintiff denied this and said that his work-ups were as adequate as anyone else's. It is significant that Dr. Allman took the work-ups to the Board, and the Board evaluated the work-ups. The Board offered the Plaintiff an opportunity to appear at the hearing to explain the work-ups if he saw fit. Plaintiff elected not to appear at the hearing though his attorney attended, and the Plaintiff remained in an adjoining room.

The Plaintiff had considerable notice in the summer and fall of 1977 that his position as a resident was in jeopardy; that the

charges and ratings by Dr. Allman had been substantiated; and that it was hoped that the Plaintiff would show improvement by January, 1978. The evidence as to the exact method of termination of the Plaintiff's residency is somewhat confusing. It appears that, at the Board meeting in December, 1977, the Plaintiff's attorney, Mr. Raymon, discussed the charges with the Board and was told that the Plaintiff would have an opportunity to resign or be allowed to repeat the second year of residency or be terminated.

After the meeting, Plaintiff absented himself from the premises without notifying the Board what his intentions were or whether or not he would be on hand to attempt to perform further duties as a resident. A lawyer in Chicago in early January, 1978, sent a letter of resignation, but the hospital authorities said that it was too late as the Plaintiff had been discharged on January 13, 1978. At that time, a black American physi-

cian was elected to take the Plaintiff's place in the VA residency program.

The Plaintiff admitted at the trial that he did not take the home studies course though it was required for his residential program. Plaintiff said he was in the process of taking the course when the Board met, and he has completed the test. Plaintiff stated he was unable to attend conferences which were required of him at the VA Hospital because he said Dr. Settler was working him at John Andrew Hospital at the time his conferences were scheduled. The Plaintiff admitted failure to complete a number of assignments made him except to the best of his ability because he said he did not have time to organize things required of him in the program.

Dr. Carden, a social friend of the Plaintiff's, substantiated to some extent Plaintiff's problems about not being able to finish his work by stating that, at about the time of the summer of 1977, the Plaintiff stopped coming or meeting with Dr. Carden and his wife

socially because the Plaintiff said he was on duty or studying or going to professional meetings.

Dr. Nagendran testified (1) that he was a native of India and a naturalized American; (2) that he was a thoracic surgeon and Chief of Surgery since July, 1976; (3) that he had known the Plaintiff since January, 1976, and had seen him operate in early 1976 where he observed that the Plaintiff's removal of a small cyst was not exactly acceptable. Dr. Nagendran said the Plaintiff showed signs of being slow and not skillful. He also reported that he was concerned because the Plaintiff referred a patient from John Andrew Hospital to the VA Hospital for Dr. Nagendran to perform a relatively simple operation which the Plaintiff should have been able to perform. He said that he asked the Plaintiff about it, and the Plaintiff did not give a satisfactory explanation. Dr. Nagendran also reported that, in the summer or fall of 1977, he had told the Plaintiff that Dr. Allman was con-

cerned about Plaintiff's progress as a resident, and the Plaintiff retorted that he would write his congressman. Dr. Nagendran reported another occasion when he conferred with the Plaintiff about having neglected his studies, and the Plaintiff asked him to write a letter of recommendation. On that occasion, the Plaintiff conceded that he had neglected his studies and said he would do better if given another chance.

The Defendant offered evidence of a series of the Plaintiff's failures in the practice of medicine prior to his coming to Alabama and thereafter. In an abundance of precaution, this Court has disregarded that evidence. Plaintiff admitted on the stand that he was rated below average in a Canadian job and that the authorities there were dissatisfied with his lack of interest in the patients and his lack of enthusiasm in 1966. In a Chicago hospital in November, 1967, the Plaintiff was employed, first, as a physical doctor, then for his psychiatric training but

that employment was soon terminated, and he went to work in January, 1970, with the Board of Health in Chicago. About one year later, this employment terminated because Plaintiff objected to evening work. Thereafter, Plaintiff appealed and was reinstated in January, 1971, but was terminated in April, 1971, for the following causes: (1) failure to perform his duties of evening physician as required; (2) failure to respond promptly to urgent calls; and (3) rudeness and hostility. After that termination, the Plaintiff was employed by the Martin Luther King Health Center upon the condition that he could remain only if he passed certain medical tests of the State of Illinois. Authorities terminated this employment when he failed those tests. Thereupon, the Plaintiff went to Puerto Rico and got his medical license. On reciprocal agreement between Puerto Rico and Missouri, the Plaintiff got a reciprocal license to practice in Missouri. From about March, 1975, to January, 1976, Plaintiff was in Chicago at the VA Hos-

pital as a GS-14 at $31,000.00 a year, but he left that job to take the residency at the Tuskegee VA Hospital at $13,000.00 a year. This evidence was not considered by this Court in determining that Plaintiff had failed to establish his case by a preponderance of the evidence.

The Plaintiff admitted that he was notified in June, 1977, that he was unsatisfactorily rated in Professional Knowledge and Evidence of Study and was notified that he could not be considered for promotion to a third-year resident unless he showed improvement. The Plaintiff admitted that in October, 1977, he received a notice from Dr. Capel that charges and ratings of Dr. Allman had been substantiated and that it was hoped he would show improvement by January, 1978. The Plaintiff testified that, thereupon, Dr. Allman set up special conferences, provided outside reading and overwhelmed him with extra work. Many of the conferences were set at 7:00 each morning, and Plaintiff, admittedly, was late to a

number of them. The Plaintiff admitted having received in Decembesr, 1977, the charges that Dr. Allman made against him at least three days before the meeting. Plaintiff also admitted that his attorney, Mr. Raymon, went into the meeting and considerably later told the Plaintiff he might come in if he liked, but the Plaintiff declined to enter the meeting. Mr. Raymon presumably informed the Plaintiff that the Board would recommend his termination or that he might resign. The Plaintiff admitted that, after the Board meeting in Tuskegee, he left Tuskegee without authority of his superiors on December 23, 1977, and went to Chicago where he stayed until February, 1978. The Plaintiff stated that while in Chicago he wrote Dr. Tull, Chief of Staff at the VA Hospital in Tuskegee, asking for leave to stay in Chicago, but he said that Dr. Tull wrote him after January 13, 1978, saying that he had been terminated on that date.

It is clear from the evidence that, after his contact with the Resident Review Board, the Plaintiff did not wait for his termination by the Hospital Director and the Medical Advisory Committee but immediately left Tuskegee without authority. In due course, the Board recommended Plaintiff's termination, and the Hospital Director and Medical Advisory Committee terminated Plaintiff's residency if it had not previously been terminated by his continued absence from December 23, 1977, to January 13, 1978.

The Plaintiff makes much of the fact that Dr. Settler, the former Chief of Ophthalmology of the Tuskegee VA Hospital, had no input in, and stated in his letter of June 28, 1978, that he did not agree with, the termination of the Plaintiff's residency. (Plaintiff's Exhibit 53). That letter of "recommendation" summarizes Settler's opinion of the Plaintiff:

> "[A]n extremely slow and methodical approach to medical problems. *** [C]hronically late to almost all

> functions and did have a 'Latin attitude' towards hard work. I was also of the opinion that he should repeat his basic science course with a view towards developing regular study habits."

With that "recommendation", it is understandable that Howard University Hospital accepted the Plaintiff as a second-year resident on probation. There may be significance in the fact that the correspondence in the file indicates that, during the chronology of events which culminated in the termination of the Plaintiff from the resident program, Dr. Settler participated to some extent in the termination. It is obvious from his September 27, 1977, letter (Defendant's Exhibit 9) that it was Dr. Settler, rather than Dr. Allman, who gave Plaintiff notice of the meeting of the Resident Review Board in October, 1977. At that meeting, the Board found that the interim ratings given by Dr. Allman were substantiated based on detailed documentation presented to

the Board which the Plaintiff had an opportunity to defend.

Where an employer is able to establish that the Plaintiff-employee was discharged for legitimate reasons, the inference of discrimination created by the Plaintiff's prima facie case is thereby rebutted. Mosby v. Webster College, 563 F.2d 901 (8th Cir. 1977); Morales v. Dain, Kalman & Quail, 467 F.Supp. 1031 (D. Minn. 1979).

It is well established that Title VII was not enacted for the purpose of guaranteeing a job to every member of a minority group, regardless of qualifications. Title VII only proscribes discriminatory preference for any group. Griggs v. Duke Power Co., 401 U.S. 424 (1971). An employer may discharge an employee because the employee is unable to perform satisfactorily, even though the employee may belong to a minority. See, Rice v. Gates Rubber Co., 521 F.2d 782 (6th Cir. 1975). The Age Discrimination and Employment Act "does not require that advanced age *** entitles[s] em-

ployees to special favorable consideration; it requires merely that an employee within the protected age group not be the subject of discrimination because of his or her age." Cova, supra, 574 F.2d at 960. The Age Discrimination and Employment Act was not intended to be a panacea for all older workers terminated by an employer. Mastie v. Great Lakes Steel Corp., 424 F.Supp. 1299 (E.D. Mich. 1976).

This Court is of the opinion that the Plaintiff failed to establish by a preponderance of the evidence that he was deprived of any rights because of his Haitian nationality or because of his age. Judgment will enter for the Defendant with costs taxed against the Plaintiff.

DONE this 8th day of November, 1979.

/s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

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NO. 79-4071

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RODRIGUE J. FRANCOIS,

Plaintiff-Appellant,

versus

MAX CLELAND, Etc.,

Defendant-Appellee.

U.S.COURT OF APPEALS
F I L E D
FEB 19 1981
GILBERT F. GANUCHEAU
CLERK

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Appeal from the United States District Court for the Middle District of Alabama

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Before FAY and HATCHETT, Circuit Judges and GROOMS*, District Judge

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

*District Judge of the Northern District of Alabama, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

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NO. 79-4071

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RODRIGUE J. FRANCOIS,

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versus

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U.S.COURT OF APPEALS
F I L E D
MAR 18 1981
GILBERT F. GANUCHEAU
CLERK

---

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING

( MAR 18 1981 )

Before FAY and HATCHETT, Circuit Judges and GROOMS*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and

numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE.

/s/ Joseph W. Hatchett
United States Circuit Judge

*District Judge of the Northern District of Alabama, sitting by designation.

Office-Supreme Court, U.S.
FILED
JUL 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2144

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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RODRIGUE J. FRANCOIS, PETITIONER

*v.*

ROBERT NIMMO, as ADMINISTRATOR OF VETERANS AFFAIRS, VETERANS ADMINISTRATION, UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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LAWRENCE G. WALLACE
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

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No. 80-2144

RODRIGUE J. FRANCOIS, PETITIONER

*v.*

ROBERT NIMMO, as ADMINISTRATOR OF VETERANS AFFAIRS, VETERANS ADMINISTRATION, UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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In this action, brought under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, petitioner claims that his discharge from a Veterans Administration Hospital residency program for poor performance was in fact caused by the hospital's failure to carry out its duties under an affirmative action plan.

1. Petitioner, a 44-year-old Haitian physician, brought this action following his discharge in early 1978 from the residency program in ophthalmology at the Veteran's Administration Hospital in Tuskegee, Alabama (Pet. App. A3). He alleged that discrimination based on his age and his national origin caused the discharge (*ibid.*). The hospital denied petitioner's claims and argued that he was discharged because of his poor performance as a resident (*id.* at A6-A7).

The core of petitioner's action in the district court was his claim that the hospital's Chief of Ophthalmology at the time of his discharge, Dr. Allman, was prejudiced against the petitioner because of his Haitian origin and his age. As a result, petitioner asserted, Dr. Allman's evaluations of his work were unfavorable and, following review by various hospital committees, he was dismissed on her recommendation (Pet. App. A5-A6). At trial, petitioner testified that Dr. Allman had made disparaging remarks about Haitians, but other testimony tended to undercut this claim (*id.* at A11-A12 & n.2). Petitioner further asserted that shortly before his discharge there had been a personality conflict between Dr. Allman and her predecessor, Dr. Settler, who had tried to help petitioner improve his performance. It was established that Dr. Settler, by then employed elsewhere, had assigned petitioner to work with him in the afternoons so that Dr. Settler could continue to supervise petitioner (*id.* at A10).[1] According to petitioner,

[1] At the time in question, Dr. Settler, who nominally remained Chief of Ophthalmology of the Tuskegee VA Hospital, had assumed a position at the John Andrew Hospital of Tuskegee Institute, and Dr. Allman "was carrying on the functions of Chief of Ophthalmology at the VA Hospital" (Pet. App. A5 n.1).

this arrangement created problems for him, as he was also expected to be on duty at the VA Hospital for part of this time (*id.* at A10, A18). Finally, petitioner claimed that Dr. Allman assigned him extra reading to do at night, further burdening him with work (*id.* at A10). It was this unusual treatment by his supervisors which, petitioner argued, was responsible for any unsatisfactory aspects of his work at the VA Hospital.

The district court carefully reviewed the evidence that supported Dr. Allman's unfavorable evaluation of petitioner's work (Pet. App. A9-A26). The court found that the evidence demonstrated petitioner's habitual lateness (*id.* at A9), absenteeism (*id.* at A9-A13), dishonesty (*id.* at A14-A16), failure to take a home studies course required for his residency program (*id.* at A18), and unacceptable performance of medical tasks (*id.* at A19-A20, A24-A25). The district court concluded that respondent had shown that petitioner was discharged for legitimate reasons and that petitioner had "failed to establish by a preponderance of the evidence that he was deprived of any rights because of his Haitian nationality or because of his age" (*id.* at A26-A27). The court of appeals affirmed this decision without opinion (Pet. App. A28) and denied a petition for rehearing (Pet. App. A29-A30).

2. The decision below is correct, does not conflict with any decision of this Court or of any other court of appeals, and does not warrant further review.

As is noted above, the district court found that petitioner had not borne his burden of proof of establishing that he was the victim of employment discrimination. In his petition, however, petitioner asserts that he is entitled to relief because his discharge was brought about by the VA Hospital's

failure to follow its own affirmative action guidelines (Pet. i, 34-35). This contention was rejected, *sub silentio*, by the district court in finding that petitioner's unsatisfactory performance was the cause of, and was a sufficient ground for, his termination. This argument was renewed in the court of appeals but was rejected there as well. In any event, the record discloses that petitioner's supervisors took affirmative steps in an attempt to correct the deficiencies in his performance. For instance, special conferences were set up to counsel petitioner (Pet. App. A22) and he was given extra reading assignments (*id.* at A10). Indeed, petitioner seeks to characterize as discriminatory the very efforts made by his supervisors to help him to upgrade his performance (*ibid.*). The VA regulations required no more, and assuredly offered petitioner no guaranty of success in the Ophthalmology Residency Program.

No matter how the issue is framed, this case is governed by the law that applies to all employment discrimination cases. As the district court observed (Pet. App. A7), the burden of proof in an action alleging age discrimination or discrimination based on national origin shifts to the employer once the plaintiff-employee has established a prima facie case. In order to rebut plaintiff's evidence, the employer has only to show that the discharge was "for good cause." *Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). In *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764 (Mar. 4, 1981), slip op. 6, this Court held that the employer must "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-

discriminatory reason," thereby rejecting the standard applied by the Court of Appeals for the Fifth Circuit in that case, which had required the employer to prove the absence of discrimination by a preponderance of the evidence. *Burdine* underscores the correctness of the standard applied by the district court in this case.[2]

The district court's determination that respondent had shown legitimate reasons for petitioner's discharge was upheld by the court of appeals. Petitioner's contentions amount to a disagreement with the district court's view of the facts in this case. No basis is presented, however, for a departure from the settled practice of this Court to decline to review such disputed factual questions when both of the courts below have resolved them in the same way. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

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[2] Petitioner apparently does not dispute the relevance of this standard to his action (see, *e.g.*, Pet. 52). He argues, however, that his allegation that the VA failed to comply with its own affirmative action plan constituted part of a prima facie case of discrimination and that the VA Hospital was accordingly required to show that petitioner would not have been treated any differently "had he received the benefits to which he was entitled" in order to rebut this charge (Pet. 46, 48). Assuming *arguendo* the soundness of this contention, it is unavailing to petitioner. In *Jones* v. *Cleland*, 466 F. Supp. 34 (N.D. Ala. 1978), aff'd, 619 F.2d 82 (5th Cir. 1980), the only case cited by petitioner in support of his contention, the court found that, had the employer's affirmative action plan been fully implemented, the plaintiff-employee would have been given the job for which she applied. 466 F. Supp. at 38. By contrast, here, the findings of the district court establish that the VA's alleged failure to follow its affirmative action guidelines was not the cause of petitioner's termination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
*Acting Solicitor General*

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